

No. 1-13-0318

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LVB MANUFACTURING COMPANY LLC,)	
)	
Plaintiff-Appellant,)	Appeal from
)	the Circuit Court
)	of Cook County.
v.)	
)	
NICOLA G. SANTINI,)	
)	
Defendant-Appellee,)	No. 11 L 5089
)	
and)	
)	
TONY PANG,)	Honorable
)	Randy A. Kogan,
)	Judge Presiding.
Defendant.)	

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

¶ 1 *HELD*: Order denying motion for leave to file an amended complaint affirmed where the proposed amended complaint did not cure the defects of the original complaint and lacked specific factual allegations, and the request was not timely made.

¶ 2 Plaintiff LVB Manufacturing Company LLC (LVB) appeals from an order of the circuit court of Cook County denying its motion for leave to file an amended complaint. LVB contends that the court abused its discretion in denying the motion where the proposed amendment cured the defects of the original complaint, would not have caused prejudice or surprise to appellee, and was timely requested. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 17, 2011, LVB filed a four-count complaint against defendants Nicola Santini and Tony Pang for breach of fiduciary duty, fraud, conspiracy, and conversion. The complaint generally alleged that Santini, while an employee of LVB, engaged in various activities that were detrimental to the company, such as soliciting clients of LVB for a new company that he was starting in California named LVB, LLC, instructing those clients to make payments that were due to LVB to his new company, and entering into a scheme with Pang to defraud LVB.

¶ 5 On June 15, 2011, Santini filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)) for failure to state a cause of action and lack of standing. Thereafter, he filed an amended motion to dismiss as well, seeking sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

¶ 6 On November 7, 2011, the circuit court set Santini's amended motion to dismiss for a hearing and granted LVB until November 15, 2011, to file a motion for leave to file an amended complaint. LVB filed a motion for leave to substitute party plaintiff and to file an amended complaint within the set time frame; however, it withdrew the motion on November 22, 2011.

¶ 7 On March 12, 2012, the circuit court entered a memorandum and order granting Santini's

motion to dismiss. In its order, the court found, *inter alia*, that LVB failed to plead whether it was a member-managed or manager-managed company and noted that, under the relevant law, "the nature of the LLC may be dispositive of whether any fiduciary duty was owed by its members or managers." LVB also failed to allege "whether the members or a manager possessed the authority to decide whether to sue in the Company's own name (as Plaintiff has done here) or whether Solomon must bring this suit as a derivative action, and, if so, to whom a demand to bring a derivative action must be issued, or the circumstances which make such a demand futile." Regarding the counts for fraud and conspiracy, the court noted that LVB "conceded that Count II (Fraud) must be re-pled" and that "Count III (Civil Conspiracy) contains no allegations that Pang engaged in conduct in furtherance of a conspiracy." As to the count for conversion, the court found that LVB had failed to plead the specific chattel of which it was wrongfully deprived, as it was required to do. The court finally noted that the documents attached to Santini's motion showed that neither he nor Pang had any connection to LVB, LLC of California. Following the dismissal of LVB's complaint, the court granted Santini's motion for sanctions and ordered him to file a fee petition. On April 19, 2012, Santini filed his petition for attorneys' fees.

¶8 On December 5, 2012, while Santini's petition for attorneys' fees was still pending, LVB filed a motion for leave to substitute party plaintiff and to file an amended complaint, substituting member Gary Solomon as the plaintiff and changing the cause of action to an accounting. The proposed amended complaint alleged that Santini breached his fiduciary duty of care to plaintiff by:

"a. reimbursing himself from LVB for expenses that were not
business expenses (as more fully set forth in the documents attached

hereto as exhibit 'A');

b. improperly transferring business funds to another company in Hong Kong that Santini controlled (as more fully set forth in the document attached hereto as exhibit 'B');

c. misappropriating funds to pay a sales commission to a sales representative named Keith Leckie who did not perform any work for LVB (as more fully set forth in the documents attached hereto as exhibit 'C');

d. ordering materials from other companies that LVB was liable to pay for and transferring said materials to another company in Hong Kong that Santini controlled (as more fully set forth in the documents attached hereto as exhibit 'D');

e. transferred gold products that LVB was liable to pay for to another company in Hong Kong that Santini controlled (as more fully set forth in the document attached hereto as exhibit 'E');

f. authorized and received reimbursements from LVB for health insurance not approved by LVB as a business expense;

g. ordering equipment from other companies that LVB was liable to pay for and transferring said equipment to another company in Hong Kong that Santini controlled (as more fully set forth in the document attached hereto as exhibit 'F');

h. failing to collect freight and customs duties (as more fully set forth in the documents attached hereto as exhibit 'G').

Despite repeated reference to attached exhibits, there were no exhibits attached to the amended complaint.¹ The amended complaint requested as relief, *inter alia*, an order requiring Santini to provide plaintiff with various information "regarding actions that he took as manager and as a member of LVB" and with a "full accounting of all financial transactions of LVB from 2008-present."

¶ 9 At a hearing on December 20, 2012, the court denied LVB's motion to file an amended complaint. The court initially noted that LVB had failed to properly plead facts, stating "you say breach of fiduciary duty. Well, when did he reimburse himself? For what expenses? What are you talking about? And if Santini was a member and a manager and of LVB, where, why, how? During what period of time? You haven't got anything here." The court then noted that it was denying the motion "because it is not the same cause of action and there is not comity of parties." Following the denial of LVB's motion, Santini voluntarily withdrew his petition for attorney's fees. LVB now appeals the denial of its motion for leave to file an amended complaint pursuant to Illinois Supreme Court Rule 303 (eff. Jun. 4, 2008).

¶ 10 II. ANALYSIS

¶ 11 LVB contends that the circuit court abused its discretion in denying its motion for leave to

¹ At the hearing on LVB's motion to amend, counsel for LVB informed the court, "we typically don't attach exhibits to a Motion For Leave to File an Amended Complaint." He then offered to show the court a set of exhibits that he had brought to the hearing, which are not part of the record.

file an amended complaint. Specifically, LVB argues that the proposed amendment would have cured the defects in the original complaint, that Santini would not suffer any prejudice or surprise as a result of the proposed amendment, and that the proposed amendment was timely requested. We review an order denying a motion seeking leave to amend a complaint for an abuse of discretion (*Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 41), and may affirm the court's ruling on any basis that appears in the record without regard to whether it relied upon such ground or whether its rationale was correct (*Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998)).

¶ 12 Section 2-616 of the Code grants the circuit court discretion to allow the amendment of a pleading “on just and reasonable terms” at any time before final judgment is entered. 735 ILCS 5/2-616(a) (West 2010). In determining whether the court abused its discretion in denying leave to file a proposed amendment, we consider four factors: “(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). “The plaintiff must meet all four factors, and ‘if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis.’ *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010).

¶ 13 “In addition, before a trial judge can be found to have abused his or her discretion in denying leave to amend, it must be clear from the record that reasons or facts were presented as a basis for requesting the favorable exercise of the court's discretion.” *Hayes Mechanical, Inc. v. First*

Industrial, L.P., 351 Ill. App. 3d 1, 7 (2004). "Illinois is a fact-pleading jurisdiction, and plaintiffs cannot rely on mere conclusions of law or fact unsupported by specific factual allegations but must allege facts sufficient to bring their claims within the scope of the cause of action asserted." *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 7.

¶ 14 Here, we find that the circuit court did not abuse its discretion in denying LVB's motion for leave to file an amended complaint. LVB's proposed amended complaint suffered from the very same defect as its original complaint; namely, a lack of specific factual allegations. For instance, the amended complaint alleged that Santini "reimburs[ed] himself from LVB for expenses that were not business expenses" and "order[ed] materials from other companies that LVB was liable to pay for and transfer[ed] said materials to another company in Hong Kong that [he] controlled." However, there is no indication when any of this happened, what expenses were reimbursed, what materials were ordered and from what companies, or what company was controlled by Santini in Hong Kong. This failure to cure the defects of the original complaint and to provide specific factual allegations, alone, justified the court in denying LVB's motion for leave to file the amended complaint. *I.C.S. Illinois, Inc.*, 403 Ill. App. 3d at 220; *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 7. That LVB had a previous opportunity to file a motion for leave to file an amended complaint in November 2011, but did not file its motion until nearly nine months after the original complaint was dismissed, is yet further justification for the court's ruling. *Loyola Academy*, 146 Ill. 2d at 273. We therefore affirm the order of the circuit court of Cook County denying LVB's motion for leave to substitute party plaintiff and to file an amended complaint.

¶ 15 Affirmed.